Supreme Court, U.S.
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No. 99-1691

IN THE

Supreme Court of the United States

CHRIS BOULAHANIS, *et al.*,

Petitioners,

v.

BOARD OF REGENTS, a body politic and corporate, ILLINOIS STATE UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant a Writ of Certiorari in order to determine whether the claims of sex discrimination against the individual defendants under 42 U.S.C. § 1983 are precluded by identical claims brought pursuant to Title IX of the education act amendments of 1972, 20 U.S.C. § 1681 *et seq.*?

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FACTUAL BACKGROUND

In 1992 Illinois State University (ISU) initiated a study of its athletic programs to evaluate data relevant to gender equity and compliance with Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681 *et seq*. (Title IX). The University appointed a Gender Equity Committee which presented a Gender Equity Committee Report in the fall of 1993. (Motion for Summary Judgment, Exhibit A to Affidavit of Linda G. Herman).

The purpose of the report was to review gender equity in the athletic programs at ISU on three levels. The reviews were to be performed for the ISU Athletic Department, for institutional self study as required by the National Collegiate Athletic Association (NCAA) certification process and for institutional self study as prescribed by the Missouri Valley Conference of which ISU is a member. The ISU Athletic Department was to incorporate the Gender Equity Committee Report in its long range planning process. (Motion for Summary Judgment, Exhibit A to Affidavit of Linda G. Herman).

The Gender Equity Committee reviewed data regarding enrollment at ISU, athletic programs and facilities, support services, transportation, publications and promotions, coaches' responsibilities, salaries, departmental policies, recruiting and academic services in compiling the report. Additionally, ISU conducted tests on financial aid data, met with coaches and, after taking these steps, compiled the 1993 Gender Equity Committee Report. (Motion for Summary Judgment, Exhibit A to Affidavit of Linda G. Herman).

The 1993 Gender Equity Report summarized legal options for compliance with Title IX. The Gender Equity Committee focused on the "test of proportionality" used by the Office of Civil Rights (OCR) to test for Title IX compliance. 44 Fed. Reg. 71413 (1979). The Report noted that two cases at the U.S. Court of Appeals level supported the use of the "test of proportionality" as "being the ultimate goal in achieving gender equity." The report listed cases involving Colorado State University and Brown University which, the report noted, indicated that "proportionality" was a key factor in Title IX compliance.[1] The "proportionality" portion of the OCR policy interpretations indicates that an educational institution may achieve Title IX compliance when participation opportunities for male and female students in intercollegiate athletics are provided in numbers substantially proportionate to their respective enrollments in the institution. 44 Fed. Reg. 71413 (1979).

In 1993, when the Gender Equity Report was issued, Illinois State University had not achieved "proportionality." The ISU undergraduate population in 1993 was 55% female and 45% male. During the same period of time, the ISU participation in NCAA intercollegiate athletics was 34% female and 66% male. (Motion for Summary Judgment, Exhibit A to Affidavit of Linda G. Herman).

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1. These cases were *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993) and *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993). The court in *Cohen* held that "a University which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." *Cohen*, 991 F.2d at 897-898. Both the *Roberts* and *Cohen* courts expressly approved the OCR "substantial proportionality" test for Title IX compliance.

After the Gender Equity Committee presented the report to the ISU administration, the athletic department sought a way to implement the objectives of the report to insure that the men's and women's operating budgets would reflect fair and equitable distributions consistent with fair and equitable participation opportunities for male and female athletes. The athletic department, in conjunction with implementing these objectives, also attempted to find a way in which the University could comply with the mandates of Title IX. From 1993 until 1995, the administration of the athletic department studied ways to comply with Title IX and to meet the objectives set forth in the gender equity committee report.

The University looked at over 40 financial participation/ sport scholarship models, later narrowing its choices to 10 final options. In February 1995, the University chose the option that provided for dropping men's intercollegiate wrestling and soccer and adding women's intercollegiate soccer as well as men's roster management and full grants in aid for both men and women. At the time the final option was selected, the NCAA had informed ISU that it was not in substantial conformity with NCAA guidelines regarding gender equity. The NCAA, as well as OCR, recognized "substantial proportionality" as satisfying its requirements for gender equity. (Affidavit of Associate Athletic Director Linda G. Herman attached to Defendant's Motion for Summary Judgment).

In March of 1995 the University adopted a gender equity management plan which eliminated men's wrestling and soccer and added women's soccer. Under that plan the men's participation ratio for intercollegiate athletics decreased from 54.35% to 48.28% while the women's participation ratio increased from 35.65% to 51.72%. The plan noted that

participation ratios were within 3% of actual enrollment and were within current tolerance limits. (Motion for Summary Judgment, Exhibit F to Affidavit of Linda G. Herman). The plan indicated, on page 4, that "case law rulings on the O.C.R. 'test of proportionality' method for determining compliance suggest that only a 3% to 5% disparity may be an acceptable variance."[2]

The fall 1993 Gender Equity Committee Report, as well as the 1995 Gender Equity Management Plan, were prepared and approved by the various individual Defendants who were either employees or officers of ISU or members of the ISU governing board.

PROCEEDINGS BELOW

The description of the proceedings below in the Petition for a Writ of Certiorari failed to note the assertion of a qualified good faith immunity defense. Qualified good faith immunity was asserted in the Defendant's Motion to Dismiss (Memorandum in Support of Motion to Dismiss Second Amended Complaint, page 21 *et seq.*) and in the Answer to the Complaint (Answer to Second Amended Complaint, fifth defense, page 12).

The Magistrate, in his recommendation on the Motion to Dismiss, found that the individual Defendants were

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2. *Roberts v. Colorado State University Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993) held, as a matter of law, that a 10.5% disparity is statistically significant and did not constitute substantial proportionality. The *Roberts* quote went on to note that "substantial proportionality" entails a fairly close relationship between athletic participation and undergraduate enrollment. *Roberts*, 998 F.2d at 829-830.

immune from liability in their individual capacities due to qualified immunity. The Magistrate noted that, "despite Plaintiff's creative interpretations of *Cohen* and *Roberts*, case law seems to point in precisely the direction taken by the University." (App. 99a-101a).[3] The District Court, in ruling on the Motion to Dismiss and the recommendation of the Magistrate, did not find it necessary to address the issue of qualified immunity on the Title IX claims, finding that Title IX did not permit a private right of action against individuals. (App. 52a, n.8).

With regard to the § 1983 claims, the District Court concluded that the Seventh Circuit's decision in *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996), precluded the § 1983 claims against the individual Defendants based upon the elimination of the athletic teams. The District Court, due to the *Waid* preclusion, did not specifically rule upon the assertion of qualified immunity in connection with the § 1983 claims when granting the Motion to Dismiss.

The District Court did, however, when granting the Motion for Summary Judgment, determine the motive of the Defendants in eliminating the men's intercollegiate wrestling and soccer teams. The Court noted:

> On the record before the Court, a reasonable jury would have no basis for finding any motive other than that the University's actions were taken in an attempt to comply with Title IX that was in accordance with the benchmark for measuring

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3. All references to the Appendix herein refer to page numbers in the Appendix to the Petition for a Writ of Certiorari.

> compliance set forth in the agency's policy interpretation.

The Court went on to note as follows:

> There can be no reasonable dispute that after elimination of men's wrestling and soccer and the addition of women's soccer, the portion of athletic opportunities available to each gender more closely approximated the respective proportions of male and female students of ISU. (App. 34a n.3).

There was no challenge to the ruling of the Magistrate or the quoted rulings of the District Court in the Petitioners' appeal to the Seventh Circuit.

REASONS FOR DENYING THE WRIT

A. REVIEW OF CONFLICTING APPELLATE COURT DECISIONS HOLDING THAT § 1983 CLAIMS ARE PRECLUDED IS INAPPROPRIATE AS THE DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES ARE ENTITLED TO QUALIFIED IMMUNITY.

Petitioners argue that the preclusion of § 1983 damage claims under the decision of this Court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and the decision of the Seventh Circuit in this case following *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996), leaves the Petitioners without any claim for damages against the individual defendants.

In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), this court held that a private right of action for monetary damages under Title IX for a teacher's sexual harassment could not be maintained against the school district unless the district had actual notice of the harassment to which it was deliberately indifferent. This Court, in *Gebser*, went on to state:

> Our decision does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983. *Gebser*, 524 U.S. at 293.

This dicta does not create any specific preclusion exemption for § 1983 claims. Petitioners interpret this quoted language from *Gebser* to create a situation where a claimant may have a § 1983 claim, based upon the same facts as the Title IX claim, which is not precluded by the application of the *Sea Clammers* doctrine. Assuming *arguendo* that such a claim exists, it would be barred by the qualified immunity of the individual defendants in this case. It also should be noted that the state law remedies of the Petitioners for damages against the individual defendants in this case survived the decisions of both the trial court and the Seventh Circuit.[4]

The Petitioners argue that § 1983 damage claims against individuals should not be precluded as such preclusion would

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4. The trial court declined to retain jurisdiction of the Petitioner's state law claims for promissory estoppel and fraudulent inducement, but dismissed the claims without prejudice to allow the claims to be refiled in state court.

leave individuals sexually harassed or discriminated against by a low level employee of the recipient of federal funds without a claim unless there is proof of knowledge of the conduct by the institution and deliberate indifference to the conduct. This argument ignores the record in this case which shows conclusively that qualified immunity would bar any § 1983 damage claims which the Petitioners might have against the individual defendants.

This Court, in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), ruled that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." To be "clearly established," the constitutional right must be sufficiently clear that a reasonable official would understand that the conduct violated the right. *Hill v. Shelander*, 992 F.2d 714, 718 (7th Cir. 1993). An analysis of qualified immunity entails a purely objective inquiry to determine whether, at the time the alleged constitutional violation occurred, the right asserted was clearly established in the factual context presented. *Schertz v. Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989). Allegations of malice do not overcome the qualified immunity defense. The only question is whether the public official acted in an objectively reasonable manner. *Klein v. Ryan*, 847 F.2d 368, 374 (7th Cir. 1988).

It is hard to envision a more compelling record for application of qualified immunity. An objective inquiry shows no violation of any clearly established right when the individual defendants acted to comply with Title IX and meet NCAA requirements. At that time, use of the "substantial proportionality" test for assuring Title IX compliance was

specifically approved by *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993), and *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993). The University specifically relied upon the OCR policy interpretations and the decisions in *Roberts* and *Cohen* in the Gender Equity Committee Report issued in the fall of 1993.

In the time period between the 1993 report and the recommendations regarding the elimination of the men's intercollegiate wrestling and soccer programs in March of 1995, the Seventh Circuit held that use of the "substantial proportionality" test was appropriate in seeking Title IX compliance. *Kelley v. Board of Trustees of University of Illinois*, 35 F.3d 265 (7th Cir. 1994). Thus, at the time ISU made its decision, all Circuit Courts of Appeals which had ruled on the issue, including the Seventh Circuit in which ISU was located, held that the action taken by ISU was proper.

Given the findings in the report of the Magistrate in this case and the finding of the District Court that the only motive which could reasonably be found for elimination of the men's team was compliance with Title IX, there is no question that good faith qualified immunity would bar any claims for damages against the individual Defendants under § 1983. Consequently, a reconciliation of the split in Circuits in favor of the Petitioners in this case would provide no additional damage claim against the individual Defendants. Review of conflicts in the circuits should not be granted unless there is some colorable claim of § 1983 individual liability for damages. Such is not the case here and the Petition should be denied.

B. THIS CASE DOES NOT PRESENT AN INSTANCE OF DISCRIMINATION BY STATE ACTORS WHICH LEAVES A VICTIM OF DISCRIMINATION WITHOUT ANY FEDERAL REMEDY.

Petitioners argue that the ruling of the Seventh Circuit in this case has serious consequences for other cases. Petitioners argue that the most serious consequence of the Title IX preclusion of § 1983 claims is that victims of discrimination by state actors may be left without any federal remedy. As noted above, this argument is directed specifically to instances where there could be a claim for damages based upon sexually discriminatory or harassing conduct by a lower level employee or agent when no official with the capacity to take corrective action had actual knowledge of the conduct.

Clearly, under existing case law, relief is available to an individual against the institution receiving federal funds under Title IX when the institution has actual knowledge of the conduct. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Under *Cannon* and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), there is a private right of action for injunctive relief and damages against the institution. The Seventh Circuit Court of Appeals in this case followed its prior ruling in *Smith v. Metropolitan School Dist. Perry Township*, 128 F.3d 1014, 1019 (7th Cir. 1997), by holding that Title IX provides for suit only against institutions and does not allow suits against individual defendants.

Petitioners' argument concerning legal remedies in *other* cases is not present in *this* case. This case does not involve discrimination through actions of a low level employee or

agent without the knowledge of an ISU official with the capacity to take corrective action. The action in this case was the elimination of two men's intercollegiate varsity sports. This was an official action of ISU. It was carried out by the individual defendants in this case who are, in descending order of authority, the governing board of the University, the President of the University and various members of the athletic department including the athletic director and the members of the committees which made the gender equity recommendations which led to the elimination of the teams. These individuals are not low ranking University agents or employees who are taking discriminatory actions of which ISU had no knowledge. Petitioners' claims against ISU were not barred by the institution's lack of knowledge that two of its men's athletic teams had been eliminated.

Petitioners in this case challenged the propriety of ISU's actions under Title IX and Title VI and did not prevail. They do not appeal from the denial of their Title IX and Title VI claims. If the basis for urging review of this case is denial of any federal remedy for discrimination, review is not appropriate as the Petitioners in this case had a federal claim against ISU for the acts of the individual defendants under Title IX and Title VI. Review of the denial of any federal claim due to preclusion of § 1983 claims should be undertaken in a case in which the court can review the facts under which a denial of the claim has occurred. There is no compelling reason to review the hypothetical denial of a federal claim in a case where claims were available.

C. THE SEVENTH CIRCUIT PROPERLY APPLIED UNITED STATES SUPREME COURT PRECEDENT IN HOLDING THAT PETITIONERS' § 1983 CLAIMS WERE PRECLUDED BY TITLE IX.

As noted in the Petition for Certiorari, the federal circuits are split regarding whether Title IX precludes suits under § 1983. *Bruneau ex rel. Schofield v. South Kortright Central School District*, 163 F.3d 749 (2d Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999) (§ 1983 claim precluded by Title IX); *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779 (3d Cir. 1990) (§ 1983 claim precluded by Title IX); *Lillard v. Shelby County Board of Education*, 76 F.3d 716 (6th Cir. 1996) (§ 1983 claim not precluded by Title IX); *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996) (§ 1983 claim precluded by Title IX); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997) (§ 1983 claim not precluded by Title IX); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996) (§ 1983 claim not precluded by Title IX). There is no need, however, to address this circuit split in the instant case because the Seventh Circuit below correctly applied the prior decisions of this Court.

1. UNDER THE *SEA CLAMMERS* DOCTRINE, REMEDIAL DEVICES THAT ARE "SUFFICIENTLY COMPREHENSIVE" SHOW CONGRESSIONAL INTENT TO PRECLUDE SUITS UNDER § 1983.

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), this Court fashioned what is now called the *Sea Clammers* doctrine:

> When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983. *Sea Clammers*, 453 U.S. at 20.

2. THE HOLDING IN *SEA CLAMMERS* IS NOT LIMITED TO § 1983 CLAIMS BASED UPON STATUTORY VIOLATIONS.

Petitioners argue that *Sea Clammers* is not applicable to the instant case because it did not deal with "independently existing constitutional rights" but rather considered a § 1983 action based upon a violation of a federal statute. Under Petitioners' argument, *Sea Clammers* has no effect on preclusion of § 1983 actions based on direct constitutional violations. That argument is misplaced, for *Sea Clammers* did not limit its application to constitutional violations, nor has any other United States Supreme Court decision limited *Sea Clammers* in such a way.

Petitioners point to *Smith v. Robinson*, 468 U.S. 992 (1984), as a decision which addressed § 1983 preclusion where the claim was based on constitutional violations. Although *Sea Clammers* and *Smith v. Robinson* dealt with different bases for § 1983 claims, *i.e.*, statute-based § 1983 claims and constitution-based § 1983 claims, respectively, *Smith v. Robinson* did not create a new doctrine nor did it create an exception or modification to *Sea Clammers*.

In *Sea Clammers*, the relevant issue was the *intent of Congress*. *Sea Clammers*, 453 U.S. at 21 ("Congress . . . intended to supplant any remedy that otherwise would be available under § 1983"). The only importance of the "comprehensive enforcement scheme" referenced in

Sea Clammers is the Congressional intent reflected by such a scheme. *See Bruneau ex rel. Schofield v. South Kortright Central School District*, 163 F.3d 749 (2d Cir. 1998) ("The ultimate question posed by the *Sea Clammers* doctrine is whether Congress *intended* to preclude § 1983 suits when it enacted the relevant federal statute") (emphasis in original). Again, in *Smith v. Robinson*, the central issue was the *intent of Congress*. *Smith v. Robinson*, 468 U.S. at 1009 ("[t]he question to be asked, therefore, is whether Congress intended that the [Act] be the exclusive avenue through which a plaintiff may assert those claims").

Petitioner maintains that, in *Smith v. Robinson*, a new element was added to the intent inquiry: that the underlying basis of the § 1983 action be "virtually identical" to the alleged violation of the relevant statute. A review of *Smith v. Robinson*, however, reveals that the Court did not require that the claims be "virtually identical." Rather, the Court merely noted in dicta that the claims were "virtually identical" and then continued to the real inquiry at hand, *i.e.*, whether Congress *intended* to preclude § 1983 suits. Just as the comprehensive enforcement scheme is a consideration in determining Congressional intent, so too is whether claims are similar. For instance, if a statutory enactment covers the identical claim as one permitted under § 1983, that certainly should be considered in determining the intent of Congress. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (implied repeal may occur when "the later act covers the whole subject of the earlier one"). However, whether a claim is "virtually identical" is not a necessary prerequisite to a finding of preclusion.[5]

5. Even assuming, for the sake of argument, that *Smith v. Robinson* did require that the statutory claim and the constitution-

(Cont'd)

Smith v. Robinson did not alter or limit the holding of *Sea Clammers*, but applied *Sea Clammers* in holding that the plaintiff's § 1983 equal protection claim was precluded. However, certain courts have grafted a *Sea Clammers* exception for "independently existing constitutional rights." In *Bruneau ex rel. Schofield v. South Kortright Central School District*, 163 F.3d 749 (2d Cir. 1998), the Second Circuit correctly framed the issue as a question of whether such an exception to *Sea Clammers* should be created. The Seventh Circuit properly declined to recognize any such exception.

3. TITLE IX CONTAINS A COMPREHENSIVE ENFORCEMENT SCHEME REFLECTING AN INTENT TO PRECLUDE SUITS UNDER § 1983.

a. TITLE IX PROVIDES COMPREHENSIVE ENFORCEMENT PROCEDURES.

Title IX provides that federal departments and agencies are "empowered to extend Federal financial assistance to any education program or activity" to (1) terminate federal funding after "an express finding on the record" and an "opportunity for a hearing" or (2) obtain compliance with Title IX by "any other means authorized by law." 20 U.S.C. § 1682. Title IX expressly provides for judicial review of such agency determinations. 20 U.S.C. § 1683. This court has acknowledged that Title IX's remedial scheme is broad.

(Cont'd)
based § 1983 claim be "virtually identical," the claims are identical in the instant case. Petitioners pursued a claim under Title IX and an equal protection claim under § 1983, both of which were based upon the same underlying facts, *i.e.*, discrimination on the basis of sex by the elimination of the two men's teams.

North Haven Board of Education v. Bell, 456 U.S. 512, 521 (1982) ("if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language") (brackets in original); *Grove City College v. Bell*, 465 U.S. 555 (1984).

b. AGENCY ENFORCEMENT OF TITLE IX CONSTITUTES A COMPREHENSIVE ENFORCEMENT SCHEME AS CONTEMPLATED IN *SEA CLAMMERS*.

Admittedly, the statutes at issue in *Sea Clammers* contained more express provisions governing enforcement than are contained within Title IX. However, Title IX incorporates administrative expertise creating a comprehensive enforcement scheme. 20 U.S.C. § 1682. In *Bruneau ex rel. Schofield v. South Kortright Central School District*, 163 F.3d 749 (2d Cir. 1998), the Second Circuit outlined the "complex administrative enforcement scheme" of Title IX:

> Under this plan, an injured individual may file a complaint with the Department of Education, see 34 C.F.R. § 100.7(b) (1997), which then must promptly investigate the allegations, see id. § 100.7(c). Absent a complaint, the Department is authorized to conduct its own periodic compliance reviews. See id. § 100.7(a). If the Department either deems the allegations in a complaint to have merit or discovers violations through its own review, it will inform the institution of the violation and attempt to resolve the matter informally. See id. § 100.7(d). When all else fails, the Department may effect

> compliance by terminating the institution's federal funding following an administrative hearing. See id. § 100.8. The original complainant has a right to petition to become an amicus curiae at a hearing held to decide whether to terminate federal financial assistance. See id. § 101.23. *Bruneau*, 163 F.3d at 756.

This enforcement scheme is no less comprehensive merely because it is contained in administrative regulations incorporated into the statute. The *Smith v. Robinson* Court noted that the statutory scheme providing a mechanism to deal with the education of handicapped children was in fact more effective than a court's involvement in a constitutional claim. *Smith v. Robinson*, 468 U.S. at 1012 ("No federal district court presented with a constitutional claim to a public education can duplicate that process [contained in the Act]"). In the same way, Title IX's enforcement mechanism is more effective than any underlying constitutional claim that could be brought in federal court. By deferring to federal agencies and departments, Congress intended to fully utilize federal entities with expertise in dealing with educational institutions. These agencies are much better able to review ongoing compliance and to remedy violations than a federal court without the expertise and administrative resources necessary to monitor those institutions. Furthermore, by deferring enforcement mechanisms to agencies, Title IX is much more flexible in adapting to new trends in education, thus adding to the effectiveness of the enforcement scheme.

Under the *Sea Clammers* doctrine, we consider the "remedial devices provided in a particular Act." *Sea Clammers*, 453 U.S. at 20. However, *Sea Clammers* does not preclude such Act from incorporating administrative rules

by reference or deferring to the expertise of federal agencies or departments. The comprehensive regulatory scheme contained in administrative regulations incorporated into Title IX reflects Congressional intent to preclude § 1983 actions just as well as provisions contained in the Act itself.

Petitioners argue that deferring Title IX enforcement to a federal agency is an improper delegation of authority. This is, however, incorrect as federal courts review agency determinations, particularly when those determinations involve "serious constitutional questions." *Miller v. Johnson*, 515 U.S. 900, 923 (1995); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 150 (1944) (discussing the proper standard to use in evaluating a federal agency's statutory interpretation). Furthermore, Title IX expressly provides that the "department or agency action taken pursuant to [20 U.S.C. § 1682] shall be subject to judicial review." 20 U.S.C. § 1683. Accordingly, Petitioners' arguments that Title IX improperly gives blind deference to federal agencies is incorrect. Much to the contrary, Title IX agency determinations are subject to even more scrutiny than decisions made under other statutes. *See* 20 U.S.C. § 1683 ("any person aggrieved . . . may obtain judicial review of such action . . . , and such action shall not be deemed committed to unreviewable agency discretion").

c. TITLE IX'S IMPLIED PRIVATE RIGHT OF ACTION MUST BE CONSIDERED IN DETERMINING WHETHER TITLE IX CONTAINS A COMPREHENSIVE ENFORCEMENT SCHEME UNDER *SEA CLAMMERS*.

In *Sea Clammers*, this Court was "faced with questions concerning the availability of a damages remedy."

Sea Clammers, 453 U.S. at 4. Neither of the statutory schemes considered in *Sea Clammers* contained a private right of action allowing damages, although both statutes authorized government enforcement, including civil penalties payable to the government. However, there was no express statutory provision for private suits allowing damages to a private plaintiff, although private suits for injunctive relief were permissible. The *Sea Clammers* court rejected an implied private action under the two relevant statutes and then reviewed whether the plaintiffs could pursue a § 1983 action for damages. In denying this additional option for private damages under § 1983, this Court fashioned the *Sea Clammers* doctrine.

Petitioner and various lower Courts have found it significant that Title IX does not contain an express, but only an implied, private right of action. Such courts seem to find that, without an express private right of action, Title IX lacks a comprehensive enforcement scheme under *Sea Clammers*. However, as discussed above, it was not significant to the *Sea Clammers* Court that those plaintiffs lacked a private right of action for damages. Whereas Title IX plaintiffs have an implied private right of action for damages, the plaintiffs in *Sea Clammers* had *neither* an express *nor* an implied private right of action for damages.

In short, the comprehensiveness of an enforcement scheme does not rest on whether a private right of action exists, whether express or implied. In any given Act, it may be the intent of Congress to provide a comprehensive enforcement scheme that is wholly applied without the involvement of private individuals. *See Waid v. Merrill Area Public Schools*, 91 F.3d 857, 862 (7th Cir. 1996) ("Congress intended to place the burden of compliance with civil rights law on educational institutions themselves").

Furthermore, this Court's reasoning in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), confirms that the implied private right of action of Title IX should be treated the same as an express private right of action. In *Cannon*, this Court addressed whether an individual plaintiff may pursue an implied private right of action under Title IX. The *Cannon* court concluded that Title IX implied a private right of action, *Cannon*, 441 U.S. at 709, and such private right of action was later determined to include money damages for Title IX violations, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

The *Cannon* court's review of the legislative history of Title IX is instructive in determining the significance of the distinction between an express private right of action and an implied private right of action. The *Cannon* court noted that Title VI and Title IX are virtually identical and that the "drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been." *Cannon*, 441 U.S. at 695. Title VI was passed in 1964 and Title IX was passed in 1972. *Cannon*, 441 U.S. at 695-696. Congress was assumed to know how courts had applied and interpreted Title VI at the time it passed Title IX. *Cannon*, 441 U.S. at 696-697.

The similarities between Title VI and Title IX are significant because, in 1967, a federal appeals court found an implied private right of action with regard to Title VI. *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967). Moreover, the *Bossier* opinion was cited with approval by various other federal courts during the years leading up to the passage of Title IX. *Cannon*, 441 U.S. at 749, n.20 (listing cases). Therefore, since Congress knew that an implied private right of action would exist for Title

IX, there was no reason for Congress to include an express private right of action in Title IX. For purposes of determining preclusion of § 1983 claims under *Sea Clammers*, it is therefore irrelevant whether Title IX had an express private right of action or merely an implied right.

d. THE SEVENTH CIRCUIT BELOW PROPERLY APPLIED THE *SEA CLAMMERS* DOCTRINE IN FINDING THAT PLAINTIFFS' § 1983 CLAIMS WERE PRECLUDED.

The Seventh Circuit below properly applied *Sea Clammers* in precluding Petitioners' § 1983 claims. Before the Seventh Circuit, Petitioners argued, *inter alia*, that there was no preclusion because Title IX, unlike § 1983, does not allow suits against individual defendants. (App. 15a). Citing *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996), the Seventh Circuit noted that "the availability of a claim against individual defendants" is not a relevant consideration because Title IX contains a comprehensive remedial scheme while placing the "burden of compliance . . . on educational institutions themselves." (App. 15a-16a).

CONCLUSION

Petitioners seek review of the decision of the Seventh Circuit that their § 1983 claims were precluded by Title IX. Review should be denied because a reversal on the preclusion issue would not change the result below in light of the qualified immunity available to the individual Defendants. Petitioners' arguments that the Seventh Circuit's decision may leave some plaintiffs without a federal remedy is merely a hypothetical situation that did not occur here. The decision at issue was an official action by ISU and therefore Petitioners had the full range of Title IX remedies available against the institution. Finally, review should be denied because the Seventh Circuit correctly applied the *Sea Clammers* doctrine. The comprehensive enforcement scheme contained in Title IX and its incorporated federal regulations shows the intent of Congress to preclude § 1983 suits. Thus, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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